Supreme Court, U.S.
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No. 03-217

In The

Supreme Court of the United States

TODD REAGAN SMITH,

Petitioner,

v.

JANIE COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether criminal intent from extraneous acts may be inferred into a legitimate transaction in order to provide sufficient evidence to prove the elements of a crime beyond a reasonable doubt?

2. Whether the admission of evidence against a person for impeachment purposes creates an exception to hearsay not subject to the Confrontation Clause; and is consideration of such constitutional claim procedurally barred, unless cause and prejudice is shown, if the constitutional objection was made along with the hearsay objection?

3. Whether jurists of reason would find the district court's assessment of Smith's claim that he is in custody in violation of the United States Constitution by virtue of being convicted without sufficient evidence to sustain such conviction, debatable or wrong?

4. Whether jurists of reason would find it debatable whether Smith's claim that he is in custody in violation of the United States Constitution by virtue of not being allowed to confront and cross-examine witnesses against him, states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling?

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion (App., *infra*, 1-3), reconsideration (App., *infra*, 4-5), and rehearing denial (App., *infra*, 33-34) of the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") are unreported. The memorandum and order (App., *infra*, 6-31) and final judgment (App., *infra*, 32) of the United States District Court for the Southern District of Texas are unreported.

JURISDICTION

The judgment of the Fifth Circuit was entered on March 11, 2003 (App., *infra*, 1). Reconsideration was granted, in part, and entered on April 16, 2003 (App., *infra*, 4). Rehearing was denied on May 16, 2003 (App., *infra*, 33). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." *U.S. Const. amend. VI.*

"A person commits an offense if he unlawfully appropriates property with intent to deprive the owner of property." *Texas Penal Code § 31.03(a).*

"Appropriation of property is unlawful if: (1) it is without the owner's effective consent; (2) the property is stolen and the actor appropriates the property knowing it was stolen by another; or (3) property in the custody of any law enforcement agency was explicitly represented by any law enforcement agent to the actor as being stolen and the actor appropriates the property believing it was stolen by another." *Texas Penal Code § 31.03(b).*

"Effective consent includes consent by a person legally authorized to act for the owner. Consent is not effective if: (A) induced by deception or coercion; (B) given by a person the actor knows is not legally authorized to act for the owner; (C) given by a person who by reason of youth, mental disease or defect, or intoxication is known by the actor to be unable to make reasonable property dispositions; (D) given solely to detect the commission of an offense; or (E) given by a person who by reason of advanced age is known by the actor to have a diminished capacity to make informed and rational decisions about the reasonable disposition of property." *Texas Penal Code § 31.01(3)* (internal quotation mark omitted)).

"(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from – (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or (B) the final order in a proceeding under section 2255. (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of

the denial of a constitutional right (3). The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2)." *28 U.S.C. § 2253(c).*

STATEMENT OF THE CASE

On December 13, 1992, Todd Reagan Smith ("Smith"), while stopped at a traffic light in his vehicle, was hit from behind by another vehicle (Trial Transcript, Volume IV, pages 267-270). The person who caused the accident was insured by American National Property & Casualty Company ("ANPAC") (Trial Transcript, Volume IV, pages 321-323). Smith hired attorney John Chiles ("Chiles"), to represent him with regard to his claims associated with the accident, who forwarded a letter of representation to ANPAC (Trial Transcript, Volume IV, page 361). The property damage adjustor from ANPAC determined the property damage to Smith's vehicle to be $1,077.00 (Trial Transcript, Volume IV, pages 421-422). On March 29, 1993, Chiles forwarded Smith's medical bills to ANPAC (Trial Transcript, Volume IV, pages 361-362). Because Smith's treatment seemed excessive to ANPAC, ANPAC requested other documentation from Chiles (Trial Transcript, Volume IV, page 368). After receiving other documentation from Chiles, including a narrative and chart notes, ANPAC suspected fraud and contacted law enforcement (Trial Transcript, Volume IV, pages 369-378). The Harris County District Attorney's office set up a sting operation whereby one of its investigators, Don Boethel ("Boethel"), would pose as a claims representative with ANPAC, offer to settle Smith's claims and, upon acceptance of the settlement check, arrest Smith (Trial Transcript, Volume III, pages

107-108). On October 7, 1993, Boethel, posing as ANPAC claims representative Carl Presley, met with Smith and Chiles at Chiles' office (Trial Transcript, Volume III, page 114). After Smith signed the settlement agreement (State's Exhibit 3, App., *infra*, 44-47) and accepted the settlement check (State's Exhibit 2, App., *infra*, 41-43), he was arrested (Trial Transcript, Volume III, pages 169-170).

Smith was charged with felony theft in accordance with Texas Penal Code § 31.03 (Trial Transcript, Volume III, page 3; App., *infra*, 1 and 18-19). At trial, the prosecutor alleged Smith was not entitled to the settlement check, because therapy had not been performed on him (Trial Transcript, Volume III, page 170). Smith moved for a directed verdict of acquittal on the basis that he received the settlement check in sole consideration of entering into the settlement agreement; therefore, he did not commit a crime when he received the settlement check (Trial Transcript, Volume VI, pages 766-767). The trial Court denied the directed verdict (Trial Transcript, Volume VI, page 767). Smith testified that he received treatment for the injuries he sustained in the accident (Trial Transcript, Volume VII, pages 1194-1195) and that he hadn't done anything wrong in accepting the offer to settle (Trial Transcript, Volume VII, pages 1209-1210). The prosecutor challenged the credibility of Smith by vigorously questioning Smith (Trial Transcript, Volume VIII, pages 1288-1294) with regard to extraneous acts in letters (App., *infra*, 35-40) that were admitted into evidence over objections of Smith (Trial Transcript, Volume VIII, pages 1266-1268). The prosecutor told the jury they could determine Smith had criminal intent when he accepted the settlement check from the extraneous acts that were presented during trial (Trial Transcript, Volume VIII, page 1431).

The jury found Smith guilty (Trial Transcript, Volume VIII, page 1445) and, despite Smith not having a criminal history (Trial Transcript, Volume X, page 96), sentenced him to eight years confinement, in the Texas Department of Criminal Justice, and fined him $10,000.00 (Trial Transcript, Volume X, page 141).

Smith appealed his conviction to the Court of Appeals of Texas, Fourteenth District, which affirmed his conviction in an unpublished opinion (App., *infra*, 7). Smith filed a petition for discretionary review, which the Texas Court of Criminal Appeals refused (App., *infra*, 7). Smith filed a State application for a writ of habeas corpus, which the Texas Court of Criminal Appeals denied without a written order on the findings of the trial Court (App., *infra*, 7). Smith filed, in the United States District Court for the Southern District of Texas ("District Court"), a Petition for Writ of Habeas Corpus of a Person in State Custody ("Petition"), alleging that he was in custody in violation of his rights under the United States Constitution (App., *infra*, 8-10). The District Court issued a memorandum and order (App., *infra*, 6-31) denying Smith's motion for summary judgment and granting summary judgment on behalf of Janie Cockrell, Director, Texas Department of Criminal Justice, Institutional Division (App., *infra*, 31). The District Court also issued a final judgment, dismissing Smith's Petition with prejudice and denying Smith a certificate of appealability (App., *infra*, 32). Smith requested a certificate of appealability, in the Fifth Circuit (App., *infra*, 1-3), on three issues Smith presented to the District Court (App., *infra*, 9). The Fifth Circuit denied Smith's request for a certificate of appealability on all three issues (App., *infra*, 3). Smith filed a motion for reconsideration, which the Fifth Circuit granted, in part,

but still denied Smith's request for a certificate of appealability (App., *infra*, 4-5). The Fifth Circuit denied Smith's request for rehearing (App., *infra*, 33-34).

REASONS FOR GRANTING THE PETITION

Crimes Are Not Created By Inference

"[T]he Due Process Clause of the Fourteenth Amendment forbids a State to convict a person of a crime without proving the elements of that crime beyond a reasonable doubt." *Fiore v. White*, 531 U.S. 225, 228-229 (2001). Since Smith was charged with felony theft in accordance with Texas Penal Code § 31.03 (Trial Transcript, Volume III, page 3; App., *infra*, 1 and 18-19), in order to convict Smith of felony theft, the State must have proved, beyond a reasonable doubt, that Smith "unlawfully appropriate[d] [the check] with intent to deprive [ANPAC] of [the check]." *Texas Penal Code § 31.03(a)*. The Texas Court of Criminal Appeals, Texas' highest criminal Court, has held that "[i]n theft, the fraudulent intent is a necessary constituent of the offense." *Green v. State*, 153 Tex. Crim. 442, 446 (1949). "The act of taking itself, without such an intent, is a mere trespass." *Id.* "If the taking be under an honest, though mistaken, claim of right, it would seem hardly necessary to cite authority that it is not theft." *Id.* "An intent to steal property and a bona fide claim of right to take it are incompatible." *Id.*, at 448. "One who takes property in good faith, under fair color of claim or title, honestly believing that he is its owner and has a right to its possession or that he has a right to take it, is not guilty of larceny even though he is mistaken in such belief, since in such case the felonious intent is lacking." *Id.*

When admitting State's Exhibits 2 & 3 (App., *infra*, 41-47) into evidence, the prosecutor stated: "Your Honor, at this time the State's offering them as the real evidence of the crime." (Trial Transcript, Volume III, page 115). Boethel testified that, after Smith signed the settlement agreement (State's Exhibit 3, App., *infra*, 44-47) and accepted the settlement check (State's Exhibit 2, App., *infra*, 41-43), he arrested Smith (Trial Transcript, Volume III, pages 169-170).

In closing argument the prosecutor stated:

> "It's a very simple situation. It's not complicated at all, because what we're here to determine is the intent of that man right there, Todd R. Smith, Dr. Todd R. Smith, and what was his intent on October 7, 1993, when he picked up that check, when he signed for it from American National Insurance for $10,000. And yeah, I agree, you've heard a lot of extraneous things. And why did you hear that? When we talked on voir dire we said we couldn't get into a person's head. You can't open it up and determine, well, what were they thinking at that particular time. So, what do you do? You look at their past. What have they done in the past? What is their scheme? What is their plan? Are they a con man waiting for another opportunity to take money? So yes, all that information was brought before you."

(Trial Transcript, Volume VIII, page 1431).

Smith being offered the settlement check as sole consideration to enter into the final settlement agreement is governed by the law of contracts. *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 178 (Tex. 1997) ("[A] release is a contract.")). "Contract interpretation is a matter of law for the trial court." *Elliott-Williams Co., Inc.*

v. Diaz, 9 S.W.3d 801, 803 (Tex. 1999). "A court's primary concern is to ascertain and give effect to the parties' *intentions as expressed in the instrument.*" *Id.*, (emphasis added).

The prosecutor recognized that Smith did not commit a crime when he accepted the settlement check as sole consideration to enter into the final settlement agreement; therefore, the prosecutor asked the jury to find that Smith had criminal intent, at the time of settlement, by looking at extraneous acts. However, the prosecutor asking the jury to create a crime by inference by determining that Smith had criminal intent, at the time of settlement, based on extraneous acts, is contrary to the teachings of this Court. "Crimes are not to be created by inference." *United States v. Laub*, 385 U.S. 475, 487 (1967). "They may not be constructed nunc pro tunc." *Id.* "[F]or no man is punishable criminally for what was not criminal when done, even though he afterward adds either the act or the intent, yet not the two together." *Bouie v. City of Columbia*, 378 U.S. 347, 358 (1964).

"Texas courts have defined a settlement as the conclusion of a disputed or unliquidated claim, and attendant differences between the parties, through a contract in which they agree to mutual concessions in order to avoid resolving their controversy through a course of litigation." *McCleary v. Armstrong World Industries, Inc.*, 913 F.2d 257, 259 (5th Cir. 1990) (internal quotation mark omitted)). There was nothing illegal about Smith accepting the settlement check as sole consideration to enter into the final settlement agreement. In fact, Texas law encourages settlements. *Transport Insurance Company v. Faircloth*, 898 S.W.2d 269, 280 (Tex. 1995) ("Public policy favors the amicable settlement of controversies. . . . Settlements are favored because they avoid the uncertainties regarding the

outcome of litigation, and the often exorbitant amounts of time and money to prosecute or defend claims at trial.")). Therefore, "[t]o punish [Smith] because he has done what the law plainly allows him to do is a due process violation of the most basic sort." *United States v. Goodwin*, 457 U.S. 368, 372 (1982) (internal quotation mark omitted)). "For an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is patently unconstitutional." *Id.*, n.4 (internal brackets & quotation marks omitted).

Since Smith took the settlement check as sole consideration to enter into the final settlement agreement, at a minimum, he "[took] property in good faith, under fair color of claim or title, honestly believing that he is its owner and has a right to its possession or that he has a right to take it, [therefore, he] is not guilty of larceny [ ], since in such case the felonious intent is lacking." *Green*, 153 Tex. Crim. at 448.

Therefore, even if extraneous acts are remotely relevant to whether Smith had criminal intent at the time of settlement, such evidence is insufficient to sustain Smith's conviction. *Jackson v. Virginia,* 443 U.S. 307, 320 (1979) ("Any evidence that is relevant – that has any tendency to make the existence of an element of a crime slightly more probable than it would be without the evidence, cf. Fed. Rule Evid. 401 – could be deemed a mere modicum. . . . But it could not seriously be argued that such a modicum of evidence could by itself rationally support a conviction beyond a reasonable doubt." (internal quotation marks omitted)).

In evaluating Smith's insufficient evidence claim, the District Court found the evidence sufficient to sustain

Smith's conviction (App., *infra*, 18-20). The District Court stated that "[t]he evidence at trial was sufficient to demonstrate that Smith unlawfully appropriated the settlement check with the requisite level of intent." (App., *infra*, 19). The District Court believed the evidence was sufficient to convict Smith of theft because there was evidence of false medical documentation and evidence that, immediately after the accident, Smith was not injured (App., *infra*, 19). Smith will agree that the portions of the record cited by the District Court did provide some evidence that the medical documentation Smith's attorney submitted to ANPAC was false. In fact, it was that documentation that caused ANPAC to initially contact law enforcement (Trial Transcript, Volume IV, pages 369-378). Smith will also agree that the District Court did cite testimony from a person, at the scene of the accident, who testified that Smith did not appear injured immediately after the accident. However, these acts, referred to by the District Court, do not supply sufficient evidence of theft with regard to Smith accepting the settlement check as sole consideration to enter into the final settlement agreement.

Criminal Intent Cannot Be Formed Without Fair Warning

"It is well settled that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution." *Jacobson v. United States*, 503 U.S. 540, 548 (1992). "Artifice and stratagem may be employed to catch those engaged in criminal enterprises." *Id.* "Thus, an agent deployed to stop the traffic in illegal drugs may offer the opportunity to buy or sell drugs and, if the offer is accepted, make an arrest on the spot or later." *Id.*, at 549.

"In such a typical case, [ ] the defendant is simply provided with the opportunity to commit a crime[.]" *Id.*, at 549-550 (internal quotation marks omitted).

Smith agrees with the contention that if a person, who is predisposed to commit a crime, is given the opportunity to commit a crime, and does commit a crime, such opportunity will not defeat prosecution of that person. However, the person must commit a crime, not just engage in a legitimate transaction. *Richardson v. United States*, 526 U.S. 813, 818 (1999) ("A violation is not simply an act or conduct; it is an act or conduct that is contrary to law.") (internal quotation marks omitted)); *Schad v. Arizona*, 501 U.S. 624, 633 (1991) ("[I]t is an assumption of our system of criminal justice so rooted in the traditions and conscience of our people as to be ranked as fundamental . . . that no person may be punished criminally save upon proof of some specific illegal conduct.") (internal citations & quotation marks omitted)).

In this case, the State believed Smith was predisposed to use the alleged fraudulent medical information, submitted by Smith's attorney to ANPAC, to obtain a check. Therefore, to obtain proof that Smith would use the alleged fraudulent medical information to obtain a check, the State, at a minimum, had to offer Smith a check based on ANPAC's review of the alleged fraudulent medical information and let Smith know that the medical information was the basis in which the check was being offered. Thereafter, if Smith accepted the check and it was proven at trial that ANPAC offered the check to Smith based on their review of the medical documentation, and conveyed this to Smith, and that Smith knew, at the time he accepted the check, the medical documentation submitted to

ANPAC was fraudulent, it would have been clear that Smith committed a crime.

However, instead of offering Smith a check in consideration of the alleged fraudulent medical information, the State offered Smith a settlement check in consideration of Smith entering into a compromise settlement agreement which does not even state that medical information, or anything else, is even being considered as part of Smith accepting the settlement check. In fact, the parties that offered Smith the settlement check specifically disclaimed that they were even liable to Smith (App., *infra*, 44), but offered Smith the check "for the *express purpose* of precluding forever any further or additional claims arising out of the aforesaid accident." (App., *infra*, 45) (emphasis added)).

In other words, the State gave Smith the opportunity to engage in a legitimate transaction, which disclaimed any criminal intent on the part of Smith, and, thereafter, at trial, used extraneous acts to infer criminal intent into the legitimate transaction. That sounds like the "indefensible sort of entrapment by the State" which this Court stated "[t]he Due Process Clause does not permit convictions to be obtained under such circumstances." *Cox v. Louisiana*, 379 U.S. 559, 571 (1965). In fact, the active misleading on the part of the State of offering Smith a settlement check as sole consideration to enter into the final settlement agreement whose terms were inexplicably contradictory to the alleged criminal conduct on the part of Smith shows that criminal sanctions are not supportable. *United States v. Laub*, 385 U.S. 475, 487 (1967) ("[C]riminal sanctions are not supportable if they are to be imposed under vague and undefined commands; or if they are inexplicably contradictory; and certainly not if the

Government's conduct constitutes active misleading.") (internal citations & quotation marks omitted)).

According to the statute Smith was convicted under, if Smith had been charged with theft for having received stolen property from the State in a sting operation, the State would have had to have proven that the property "was explicitly represented [ ] to [Smith] as being stolen and [Smith] appropriate[d] the property believing it was stolen by another." *Texas Penal Code § 31.03(b)(3)*. "Explicitly" is defined as "expressed without vagueness or ambiguity . . . clearly formulated or defined . . . forthright and unreserved in expression[.]" *Webster's II, New College Dictionary* 395 (2001). The reason the statute requires the property to be "explicitly" represented as being stolen prior to appropriation is to give the person appropriating the property "fair warning" that they are engaging in criminal activity. "It is settled that the fair-warning requirement embodied in the Due Process Clause prohibits the States from holding an individual criminally responsible for conduct which he could not reasonably understand to be proscribed." *Rose v. Locke*, 423 U.S. 48, 49 (1975) (internal quotation mark omitted)); *Bouie*, 378 U.S. at 351 ("[N]o man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."). Therefore, the State could not sell a person property that was stolen, without representing to the person it was stolen, then, at trial, prove that the person was guilty of theft by offering evidence that they had purchased stolen property in the past. Likewise, the State cannot offer Smith a settlement check in consideration of Smith entering into a compromise settlement agreement which does not even state that medical information, or anything else, is even being considered as part of Smith accepting the

settlement check, then, at trial, use extraneous acts to prove Smith had criminal intent when he accepted the settlement check.

While Smith will agree that the reverse side of the settlement agreement did contain warnings of possible criminal sanctions (App., *infra*, 46-47), these warnings only further led Smith to believe that he was not engaging in criminal conduct when he accepted the settlement check as sole consideration to enter into the final settlement agreement. Everything associated with this case happened in Texas. Therefore, since Texas was specifically excluded from the list of States giving warnings of possible criminal sanctions, Smith had reason to believe that he was not engaging in criminal conduct when he accepted the settlement check as sole consideration to enter into the final settlement agreement. In addition, while the conduct listed on the back of the settlement agreement may constitute an offense for insurance fraud in the States listed, such does not provide sufficient evidence for the offense of theft, alleged to have occurred in Texas. *Jackson*, 443 U.S. at 323-324 ("Under our system of criminal justice even a thief is entitled to complain that he has been unconstitutionally convicted and imprisoned as a burglar.").

Since Smith did not have fair warning that he would be engaging in any criminal conduct when he accepted the settlement check as sole consideration to enter into the final settlement agreement, Smith could not have had any criminal intent when he accepted the settlement check. In addition, since the warnings of criminal sanctions on the back of the settlement agreement were "inexplicably contradictory" with the offer of final settlement on the front of the settlement agreement, criminal sanctions

would not be supportable even if warnings associated with the State of Texas had been given. *United States v. Laub*, 385 U.S. 475, 487 (1967).

Evidentiary Sufficiency Based On Crimes By Inference Without Fair Warning Conflicts With The Precedent Of This Court And Is An Important And Recurring Matter

The Fifth Circuit found that reasonable jurists would not find the District Court's assessment of Smith's claim that he is in custody in violation of the United States Constitution by virtue of being convicted without sufficient evidence to sustain such conviction, debatable or wrong (App., *infra*, 1-5). However, as set forth above, the precedent of this Court does not allow a State to prove criminal intent, in theft, beyond a reasonable doubt, by inferring criminal intent into a legitimate transaction, with extraneous acts, without fair warning that a crime is being committed. Therefore, the District Court's assessment of Smith's claim is not only debatable, but is wrong; therefore, Smith is entitled to a certificate of appealability on that claim. *Miller-El v. Cockrell*, 123 S.Ct. 1029, 1040 (2003) ("[W]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.")).

This matter is not only important to Smith, but is also important to the general public because the settlement of claims is widespread in society. At trial, Boethel testified that he has engaged in many of these sting operations, whereby he meets with people to settle their claims and

arrests them. (Trial Transcript, Volume III, page 107). Therefore, this Court should resolve this important and recurring issue in which law enforcement induces people to settle claims on terms that are "inexplicably contradictory" with criminal conduct and, thereafter, without "fair warning," charge them with a "crime by inference."

The Confrontation Clause Is Not Circumvented By Hearsay Evidence Used To Impeach

"In all criminal prosecutions, state as well as federal, the accused has a right, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, to be confronted with the witnesses against him." *Lilly v. Virginia*, 527 U.S. 116, 123 (1999) (internal quotation mark omitted)).

During the course of Smith's trial, the prosecutor moved to have letters (App., *infra*, 35-40), allegedly written and signed by Chris Zocco, D.C., Peggy Mesman, and Rachel Estopinal, admitted into evidence (Trial Transcript, Volume IX, State's Exhibit 54 [letters]). Smith objected to the admission of the letters by saying "they are inadmissible hearsay, your Honor, and not admitted for any other purpose." (Trial Transcript, Volume VIII, page 1266). To which the trial Court immediately replied, "Well, I'm going to overrule your objection as to hearsay in that they are being offered to impeach the defendant in regards to testimony made." (Trial Transcript, Volume VIII, page 1266). Smith also objected to the letters by saying, "I can't cross-examine the declarant, don't know the purpose for their writing the letter." (Trial Transcript, Volume VIII, page 1267). To which the trial Court immediately replied, "And you made your objection. That objection as well will

be overruled." (Trial Transcript, Volume VIII, page 1268). The trial Court admitted the letters into evidence (Trial Transcript, Volume VIII, page 1284).

While offering no reason for the unavailability of the alleged authors of the letters to be able to testify in person, or otherwise offer a guarantee as to the trustworthiness of the contents of the letters, the prosecutor vigorously questioned Smith with regard to the contents of the letters, which accused Smith of numerous crimes and bad acts, including stealing and being a pathological liar (Trial Transcript, Volume VIII, pages 1288-1294).

Admission Of The Letters Violates Fundamental Fairness

Since the letters were not even as credible as ex parte affidavits, Smith's rights under the Confrontation Clause were brought into play. *Lilly*, 527 U.S. at 125 ("The analogy to the presentation of ex parte affidavits in the early English proceedings thus brings the Confrontation Clause into play no matter how narrowly its gateway might be read."). The trial Court "overrul[ing] [Smith's] objection as to hearsay in that they are being offered to impeach [Smith] in regards to testimony made[ ]" does not create an exception to the Confrontation Clause, because "[t]o be admissible under the Confrontation Clause, . . . hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial." *Id.*, at 138 (internal quotation marks omitted). Therefore, the trial Court allowing the letters to be admitted to impeach Smith about why he left Louisiana (App., *infra*, 2) does not make the letters admissible.

"Established practice, in short, must confirm that statements falling within a category of hearsay inherently carry special guarantees of credibility essentially equivalent to, or greater than, those produced by the Constitution's preference for cross-examined trial testimony." *Id.*, (internal brackets & quotation marks omitted). Since these letters were dated as having been written in 1990 (App., *infra*, 35-38) and have no relevance to Smith having accepted a settlement check in 1993, they do not carry the special guarantees of credibility required by this Court. Accordingly, Smith's rights to confront and cross-examine witnesses against him, were violated. *Dowling v. United States*, 493 U.S. 342, 352 (1990) ("Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation . . . [w]e, therefore, have defined the category of infractions that violate fundamental fairness very narrowly." (internal quotation marks omitted)).

Whether A Procedural Bar Is Adequate To Bar Review Of A Federal Question Is A Federal Question

The District Court refused to review the merits of Smith's claim that his rights to confront and cross-examine witnesses against him were violated. (App., *infra*, 11-13). The District Court stated the claim was procedurally barred, "[b]ecause Smith has presented no reason for failing to raise his constitutional objection *separately* from his hearsay objection[.]" (App., *infra*, 13) (emphasis added)). The District Court states that the State Court of Appeals' holding "that Smith's objection was *not sufficient* to place the trial court on notice that he was raising a constitutional objection in addition to the hearsay

objection[ ]" (App., *infra*, 12, emphasis added) was an independent and adequate basis for not reviewing the merits (App., *infra*, 12). However, "the adequacy of state procedural bars to the assertion of federal questions is itself a federal question." *Douglas v. Alabama*, 380 U.S. 415, 422 (1965). "In determining the sufficiency of objections [this Court has] applied the general principle that an objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to serve legitimate state interests, and therefore sufficient to preserve the claim for review[.]" *Id.*

"[T]he assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *James v. Kentucky*, 466 U.S. 341, 349 (1984). "Where it is inescapable that the defendant sought to invoke the substance of his federal right, the asserted state-law defect in form must be [ ] evident [ ]." *Id.*, at 351. "[D]o not presume acquiescence in the loss of fundamental rights[.]" *Fuentes v. Shevin*, 407 U.S. 67, 94 n.31 (1972). "Indeed, in the civil no less than the criminal area, courts indulge every reasonable presumption against waiver [of fundamental rights]." *Id.*

As set forth above, Smith's hearsay and constitutional objections were each overruled by the trial Court. In fact, when the trial Court overruled Smith's constitutional objection the trial Court stated, "That objection *as well* will be overruled." (Trial Transcript, Volume VIII, page 1268) (emphasis added)). This shows that the trial Court recognized that Smith made a different objection to the previous hearsay objection Smith had made to the same evidence (Trial Transcript, Volume VIII, page 1266). Therefore, the State Court of Appeals' determination, "that

Smith's objection was not sufficient to place the trial court on notice that he was raising a constitutional objection in addition to the hearsay objection[ ]" (App., *infra*, 12), is incorrect. *Kaupp v. Texas*, 123 S.Ct. 1843, 1847 (2003) ("Contrary reasons mentioned by the state courts are no answer to the facts.")); *Mullaney v. Wilbur*, 421 U.S. 684, 691 n.11 (1975) ("[A] state-court interpretation of state law [may be re-examined] when it appears to be an obvious subterfuge to evade consideration of a federal issue." (internal quotation mark omitted)).

"[F]ederal habeas courts must ascertain for themselves if the petitioner is in custody pursuant to a state court judgment that rests on independent and adequate state grounds." *Coleman v. Thompson*, 501 U.S. 722, 736 (1991). "In habeas, if the decision of the last state court to which the petitioner presented his federal claims fairly appeared to rest primarily on resolution of those claims, or to be interwoven with those claims, and did not clearly and expressly rely on an independent and adequate state ground, a federal court may address the petition." *Id.*, at 735. Since the State Court of Appeals and District Court stated Smith's hearsay and constitutional objections were interwoven, and Smith obtained a ruling on each from the trial Court, review of the merits is not barred.

In addition, "in all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Id.*, 750.

Smith pled cause and prejudice in the District Court (see Petition, pages 17-18) for the alleged procedural default. Smith stated that the cause for the default would be that given the trial Court's response in overruling Smith's objection, Smith thought the trial Court understood Smith was raising the constitutional issue of confrontation; therefore, Smith did not knowingly or through negligence give up a known constitutional right. Smith stated the actual prejudice is that if Smith is not allowed to pursue this issue, he will be punished for not properly preserving a constitutional issue when he thought he did preserve the issue. The District Court did not make any ruling with regard to Smith's pleading of cause and prejudice.

Procedural Bars To Constitutional Claims Based On Multiple Objections To The Same Evidence Is An Important and Recurring Issue

The Fifth Circuit found that reasonable jurists would not find the District Court's assessment of Smith's claim debatable or wrong (App., *infra*, 1-5). However, as set forth above, the precedent of this Court shows that jurists of reason would find that Smith has presented a valid constitutional claim, and would also find that it is debatable whether the District Court was correct in stating the claim was procedurally barred. Therefore, Smith is entitled to a certificate of appealability. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) ("When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition

states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.")).

The opinion of the District Court, and the Fifth Circuit's approval of the same, conflicts with the established precedent of this Court on matters that are of great importance to the general public. The right to confront and cross-examine witnesses is a fundamental right this Country was established on. In the criminal context, that right comes into play in practically every proceeding in this Country. Since a hearsay objection will, in many instances, be made along with a Confrontation Clause objection, review of this important right will be circumvented if the State is allowed to bar review based on multiple objections being made to the same evidence.

CONCLUSION

Todd Reagan Smith respectfully requests the Court grant this petition for a writ of certiorari.

Respectfully submitted,

TODD REAGAN SMITH
11205 Bellaire Blvd., Suite B31
Houston, Texas 77072
(281) 879-9000

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-21133
USDC No. H-02-CV-10

TODD REAGAN SMITH,

Petitioner-Appellant,

versus

JANIE COCKRELL, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL
JUSTICE, INSTITUTIONAL DIVISION,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

(Filed Mar. 11, 2003)

ORDER:

Todd Reagan Smith has applied for a certificate of appealability ("COA") for an appeal from the district court's judgment dismissing his application for a writ of habeas corpus challenging his 1995 conviction for theft in violation of TEX. PENAL CODE ANN. § 31.03 (West 1994). 28 U.S.C. § 2253(c)(1)(A); *see Smith v. State,* No. 14-95-01354-CR (Tex. App. Oct. 8, 1998), 1998 WL 724601, *1 (unpublished).

Smith contends that the evidence of his guilt was insufficient. Smith supported his claim with a medical narrative ostensibly prepared by Dr. David Singleton. Singleton testified that he did not treat Smith and had not

prepared the narrative. The state habeas court found that Smith had applied Singleton's signature to the report using a rubber stamp which Smith had prepared without Singleton's knowledge or consent. This finding is presumptively correct and Smith has not carried his burden of rebutting the presumption with clear and convincing evidence. *See* 28 U.S.C. § 2254(e). In light of the state habeas court's finding, Smith cannot show that the state appellate court's rejection of his sufficiency-of-evidence issue involved an unreasonable application of the standard in *Jackson v. Virginia,* 443 U.S. 307 (1979). *See Martinez v. Johnson,* 255 F.3d 229, 244 & n.19 (5th Cir. 2001, *cert. denied,* 534 U.S. 1163 (2002); *see also* 28 U.S.C. § 2254(d)(1).

Smith contends that his constitutional right to confront adverse witnesses was violated because the trial court admitted hearsay evidence, consisting of letters written by Chris Zocco, D.C., and members of Dr. Zocco's staff, stating that Smith was untruthful, a "breeder of discord," and a thief. Dr. Zocco explained in her letters the reasons why Smith was discharged from his internship with her. Smith testified on direct examination that he left Louisiana because the state chiropractic board did not want his employer to open any more clinics and that his Louisiana chiropractic license was held up for that reason. The state sought introduction of the Zocco letters to impeach this testimony. Smith put his own credibility at issue by making statements of fact which Dr. Zocco's letters tended to show were untrue. Admission of the evidence did not render the trial fundamentally unfair. *See Johnson v. Puckett,* 176 F.3d 809, 820 (5th Cir. 1999); *see also Smith,* 1998 WL 724601 at *17-19.

Smith complains that he was not permitted to recall two witnesses to give testimony about his good character. The reputation testimony was cumulative and "had no direct bearing on the elements of the crime with which [Smith] was charged." *See Roussell v. Jeane,* 842 F.2d 1512, 1516 (5th Cir. 1988).

Smith contended in the district court that his right to due process was violated because: (1) the State knowingly presented perjured testimony; (b) the trial court admitted certain documents into evidence; and (c) the trial court limited the testimony of defense witnesses. Smith contended also that he received ineffective assistance of counsel. Because Smith did not present these issues in his COA application, they are waived. *See Hughes v. Johnson,* 191 F.3d 607, 613 (5th Cir. 1999).

Because Smith has not shown that "reasonable jurists would find the district court's assessment of [his] constitutional claims debatable or wrong," *see Slack v. McDaniel,* 529 U.S. 473, 484 (2000), he has not made a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2). COA is DENIED.

/s/ Carl E. Stewart
CARL E. STEWART
UNITED STATES
CIRCUIT JUDGE

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 02-21133

TODD REAGAN SMITH,
Petitioner-Appellant,

VERSUS

JANIE COCKRELL, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL
JUSTICE, INSTITUTIONAL DIVISION,
Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Texas, Houston

(Filed Apr. 16, 2003)

Before JONES, STEWART, and DENNIS, Circuit Judges.

BY THE COURT:

A member of this panel previously denied petitioner's application for certificate of appealability ("COA"). The Panel has considered petitioner's motion for reconsideration. To the extent that petitioner moves this court to withdraw the March 11, 2003 order denying COA and reconsider his application in the light of the Supreme Court's recent opinion in *Miller-El v. Cockrell*, 123 S.Ct. 1029 (2003), the motion is GRANTED.

A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." *See* 28 U.S.C. § 2253(c)(2). This determination requires an

overview of a petitioner's claims and a "general assessment of their merits." *Miller-El*, 123 S.Ct. at 1039. "We look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason." *Id.* Smith has not demonstrated that reasonable jurists would find the district court's assessment of his constitutional claims debatable or wrong. Accordingly, COA is DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

TODD REAGAN SMITH, Petitioner,	§	
v.	§	CIVIL ACTION NO. H-02-0010
JANIE COCKRELL, Respondent.	§	

MEMORANDUM AND ORDER

(Filed Sep. 16, 2002)

Pending before the court are the Motion for Summary Judgment (Docket Entry No. 7) filed by petitioner, Todd Reagan Smith, and the Motion for Summary Judgment with Brief in Support (Docket Entry No. 8) filed by respondent, Janie Cockrell. Smith has also filed an Amended Motion for Summary Judgment and Response to Respondent's Motion for Summary Judgment (Docket Entry No. 10). For the reasons stated below, Smith's motions will be denied, Cockrell's motion will be granted, and Smith's Petition for a Writ of Habeas Corpus by a Person in State Custody (Docket Entry No. 1) will be dismissed.

I. Background

Todd Reagan Smith was in a car accident in December of 1992. *Smith v. State*, No. 14-95-01354-CR at 2 (Tex. App. – Houston [14th Dist.] Oct. 8, 1998, pet. ref'd). Smith made a claim to American National Property and Casualty Insurance Company ("American National") seeking reimbursement of medical expenses for treatment of injuries he sustained in the accident. *Id.* Smith claimed to have

received medical treatment from Dr. David Singleton (an unlicensed medical intern) and Paul Kassner (an airplane mechanic). The trial testimony tended to show that Smith did not receive such treatment and that Smith did not appear to have been injured in the accident. The insurance carrier, suspecting fraud, notified law enforcement and assisted in setting up a "sting operation," wherein the insurance company presented Smith with both a settlement check, which Smith accepted, and a release, which Smith signed. *Id.* On November 17, 1994, Smith was indicted for felony theft. *Ex parte Smith*, Application No. 48,361-03 at 687 (Tex. Crim. App. Dec. 19, 2001).

On November 15, 1995, a jury in the 176th District Court of Harris County, Texas, found Smith guilty of theft in the third degree and sentenced him to eight years in prison and a $10,000 fine. *Ex parte Smith*, Application No. 48,361-03 at 827. Smith is now on parole. *Id.* at 59. Smith appealed and the Fourteenth Court of Appeals affirmed his conviction in an unpublished opinion on September 17, 1998. *Smith v. State*, No. 14-95-01354-CR (Tex. App. – Houston [14th Dist.] Sept. 17, 1998). The Fourteenth Court of Appeals withdrew its September 17, 1998, opinion and again affirmed Smith's conviction in an unpublished, corrected opinion filed on October 8, 1998. *Smith v. State*, No. 14-95-01354-CR (Tex. App. – Houston [14th Dist] Oct. 8, 1998, pet. ref'd) (hereinafter "Corrected Opinion"). Smith filed a petition for discretionary review, which the Texas Court of Criminal Appeals refused on April 19, 1999. *Smith v. State*, No. 012-99 (Tex. Crim. App. April 19, 1999).

Smith filed a state application for a writ of habeas corpus, which the Texas Court of Criminal Appeals denied without written order on the findings of the trial court on

December 19, 2001. *Ex parte Smith*, Application No. 48,361-03 at cover. On January 4, 2002, Smith filed his Petition for Writ of Habeas Corpus of [sic, by] a Person in State Custody (Docket Entry No. 1), and as grounds for relief alleges that

(1) the prosecutor knowingly used the following perjured testimony at Smith's trial:

(a) David Singleton, M.D., and Don Boethel's testimony about whether the narrative report of Smith's medical records was forged (Smith's Ground for Relief No. 1[1]);

(b) Singleton's testimony about whether Smith had falsely submitted documents to insurance companies with Singleton's name on them (Smith's Ground for Relief No. 2);

(c) Richard Pigg and Maricela Soto's testimony at the punishment phase of Smith's trial about whether Smith had staged an accident (Smith's Ground for Relief No. 3); and

(d) the prosecutor's statements at the punishment phase of Smith's trial when she recited information contained in a narrative report in order to substantiate

[1] For the sake or organization and clarity, Smith's sixteen grounds for relief have been grouped into eight categories. The numbering used by Smith in his petition is indicated parenthetically and will be referred to throughout this opinion as "Smith's Ground for Relief No. 1," for example.

that Smith had staged an accident (Smith's Ground for Relief No. 4);

(2) he was denied the right to confront and cross-examine Chris Zocco, D.C., Peggy Mesman, and Rachel Estopinal, whose written allegations were used as testimony against Smith at trial (Smith's Ground for Relief No. 5);

(3) he was denied the right to present witnesses in his own defense when he was not allowed to present Mike Clark and Robert Maxwell as character witnesses (Smith's Ground for Relief No. 6);

(4) there was insufficient evidence to support a guilty verdict[2] because

(a) the prosecution failed to present any evidence to show that Smith committed a crime (Smith's Ground for Relief No. 7);

(b) the prosecution failed to prove beyond a reasonable doubt that Smith unlawfully appropriated the subject property (Smith's Ground for Relief No. 8);

(c) the prosecution failed to prove beyond a reasonable doubt that the property Smith unlawfully appropriated was a

[2] Smith alleges in his Grounds for Relief Nos. 7-10 that the absence of sufficient evidence to support a finding of guilt violates his right to be free from double jeopardy. Smith presents no allegation, evidence, or argument to demonstrate that he has been or will be prosecuted twice for the same crime. Therefore, to the extent Smith is raising double jeopardy as an independent claim for relief, that claim will be denied.

"check" (Smith's Ground for Relief No. 9); and

(d) the prosecution failed to prove beyond a reasonable doubt that Kathy Samsel was the owner of the property Smith unlawfully appropriated (Smith's Ground for Relief No. 10);

(5) his constitutional rights were violated when the trial court admitted into evidence:

(a) State's Exhibit No. 26 (insurance company's claim file) (Smith's Ground for Relief No. 11);

(b) letters written and signed by Chris Zocco, D.C., Peggy Mesman, and Rachel Estopinal, each containing evidence of extraneous offenses (Smith's Ground for Relief No. 12); and

(c) the testimony of Richard Pigg regarding allegations that Smith had staged an accident (Smith's Ground for Relief No. 13);

(7) his constitutional rights were violated when the trial court excluded the following evidence:

(a) Mike Clark's testimony about Paul Kassner's reputation for truthfulness (Smith's Ground for Relief No. 14);

(b) Jerry Cobb's testimony about Mike Clark's reputation for truthfulness (Smith's Ground for Relief No. 15); and

(8) he was denied effective assistance of counsel at trial (Smith's Ground for Relief No. 16).

Cockrell moves for summary judgment on several grounds. First, Cockrell argues that because the Texas Court of Criminal Appeals refused to review a number of claims already raised on direct appeal, those claims are now procedurally defaulted. Cockrell also argues that each of Smith's grounds for relief is without merit.

II. Analysis

A. Standard of Review

A court cannot grant a writ of habeas corpus with respect to any claim that was adjudicated on the merits in state court unless the state court decision:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). In reviewing a federal habeas petition of a person in state custody, "a determination of a factual issue made by a State court shall be presumed to be correct," and the petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

B. Procedural Default

Cockrell argues that because the Texas courts refused to reach the merits of Smith's Ground for Relief No. 5, it is

procedurally barred. On direct appeal Smith argued that he was denied his Sixth Amendment right to confront adverse witnesses when the trial court admitted certain portions of State's Exhibit 54 – letters from Chris Zocco, D.C., Peggy Mesman, and Rachel Estopinal – to the Louisiana Board of Chiropractic Examiners. The Fourteenth Court of Appeals stated that a trial objection that does not comport with the complaint raised on appeal presents nothing for review. (Corrected Opinion at 28) The court explained that at trial Smith objected to the documents on the basis of hearsay, "and in the course of his objection, mentioned that he would not be able to cross-examine the declarant[s]." (Corrected Opinion at 28) The court held that Smith's objection was not sufficient to place the trial court on notice that he was raising a constitutional objection in addition to the hearsay objection. (Corrected Opinion at 28) The Texas Court of Criminal Appeals held that this claim need not be reviewed again in the context of a habeas petition because it had been raised and rejected on direct appeal. *Ex parte Smith*, Application No. 48,361-03 at 683.

When the state court has denied relief on the basis of an independent and adequate state procedural rule, a prisoner may not obtain federal habeas relief absent a showing of cause for the default and actual prejudice. *Evans v. Cockrell*, 285 F.3d 370, 375-76 (5th Cir. 2002). A prisoner can also obtain relief by showing that failure to consider the claims will result in a "miscarriage of justice." *Williams v. Puckett*, 283 F.3d 272, 280 (5th Cir. 2002). "The fundamental miscarriage of justice exception to the rule that state procedural default bars federal habeas review is limited to cases where the petitioner can make a persuasive showing that he is actually innocent of the

charges against him." *Finley v. Johnson*, 243, F.3d 215, 220 (5th Cir. 2001).

The Fifth Circuit has held that the rule of law applied by the Fourteenth Court of Appeals in this case is a version of Texas's contemporaneous objection rule, which the Texas courts have applied strictly and regularly, and which is an impendent and adequate state-law procedural ground sufficient to bar federal habeas review. *Hughes v. Johnson*, 191 F.3d 607, 614 (5th Cir. 1999), *cert. denied*, 120 S. Ct. 1003 (2000). Because Smith has presented no reason for failing to raise his constitutional objection separately from his hearsay objection, and because Smith has presented no colorable claim of factual innocence, Smith's Ground for Relief No. 5 is procedurally defaulted.

Cockrell also argues that a number of Smith's other claims are procedurally defaulted because the Texas Court of Criminal Appeals refused to review them on their merits during the state habeas proceedings. The Texas Court of Criminal Appeals refused review because the claims had already been raised on direct review. These arguments are without merit. A habeas claim that the Texas Court of Criminal Appeals refuses to review because it has already been litigated on its merits on direct review is not procedurally defaulted. *Bennett v. Whitley*, 41 F.3d 1581, 1583 (5th Cir. 1994).

C. Perjured Testimony

Smith alleges that his constitutional rights were violated when the prosecution knowingly introduced perjured testimony at his trial. To establish that his due process rights have been violated, Smith "must show (1) the actual falsity of a witness's testimony, (2) that the

testimony was material, and (3) that the prosecution knew the witness's testimony was false." *Kutzner v. Johnson*, 242 F.3d 605, 609 (5th Cir. 2001) (citing *Giglio v. United States*, 92 S. Ct. 763 (1972)).

In his Ground for Relief No. 1 Smith alleges that both Singleton and Boethel perjured themselves when they testified that Smith's medical records were falsified. Dr. Singleton testified at trial that although the signatures on some of the documents admitted into evidence at trial looked like his, he did not sign them. (Trial Transcript, Vol. V at pp. 495-96) As evidence of Singleton's perjury Smith presents the opinion of a handwriting expert contradicting Singleton's trial testimony. According to Smith's handwriting expert, Singleton's signature appears on the documents that Singleton denies signing. *Ex parte Smith*, Application No. 48,361-03 at pp. 107-110 (Letter of Opinion). The court is not persuaded by this argument. At best Smith has presented evidence that conflicts with Singleton's testimony.[3] Smith has presented no evidence that Singleton believed the signature was his when he testified otherwise. Moreover, even assuming for the sake of argument that Singleton did perjure himself, Smith has presented no evidence that the prosecution knew about it.

Smith also alleges in his Ground for Relief No. 1 that instead of hiring a handwriting expert, the prosecution called Boethel, an experienced investigator, to testify that the documentation submitted by Smith to the insurance

[3] To a certain extent, the handwriting expert's opinion does not even conflict with Smith's trial testimony. Smith admitted at trial that the subject signature looked like his. (Trial Transcript, Vol. V at p. 495)

company was fraudulent. Again, the mere fact that a handwriting expert has opined that Singleton did sign the records submitted to the insurance company does not demonstrate that Boethel testified falsely. Smith has presented no evidence to demonstrate that Boethel testified falsely or that the prosecution knew Boethel was going to testify falsely. *Cf. Kutzner*, 242 F.3d at 609 (noting that "[c]onflicting or inconsistent testimony is insufficient to establish perjury").

In his Ground for Relief No. 2 Smith argues that it was crucial for the prosecution to show that Dr. Singleton was an innocent, taken advantage of by Smith. Accordingly, Smith argues it was crucial to the prosecution's case to show that Dr. Singleton believed he was performing a mere clerical function, as opposed to actually practicing medicine, when signing his name to medical narratives he reviewed. Smith alleges that, for example, Dr. Singleton committed perjury when he testified that he was reviewing and signing medical narrative reports for the purpose of verifying their clerical accuracy, and not as a treating physician, and when he testified that he did not know Smith was submitting the documents with his signature to insurance companies. Although Smith has pointed out a number of ways that Singleton's testimony might be impeached, he has presented no evidence to indicate that Singleton's testimony is perjured. Smith has also failed to demonstrate that the prosecution knowingly presented Singleton's perjured testimony.

In his Grounds for Relief Nos. 3 and 4 Smith alleges that during the punishment phase of the trial the prosecutor knowingly presented her own perjured testimony, as well as the perjured testimony of Richard Pigg and Maricela Soto, about Smith's staging of an accident. Smith

seems to be arguing that Pigg committed perjury when he testified that he and Smith had staged an accident. Smith also argues that Soto committed perjury when she authenticated an allegedly falsified report signed by L.W. Hurdiss, M.D., analyzing an x-ray of Pigg's wrist (*Ex parte Smith*, Application No. 48,361-03 at 250). Finally, Smith argues that the prosecutor committed perjury when she showed the report to Smith, read some information from the report, and asked Smith questions about whether he and Pigg had staged an accident.

Smith hinges his entire perjury claim on the notion that the report signed by Dr. Hurdiss was falsified. Although Smith strings together an interesting series of allegations casting doubt on the veracity of the report, there is no indication that the prosecutor knew it was falsified (if indeed it was). There is also no indication that the prosecution believed Pigg or Soto would perjure themselves on the witness stand.

Smith's claims that the prosecution knowingly presented perjured testimony are without merit. The Texas Court of Criminal Appeals' conclusion of law to the same effect was therefore not unreasonable. *See Ex parte Smith*, Application No. 48,361-03 at p. 8.

D. Exclusion of Maxwell and Clark

In his Ground for Relief No. 6 Smith alleges he was denied the right to present witnesses in his own defense when he was not allowed to present Mike Clark and Robert Maxwell as character witnesses. When the prosecution rested its rebuttal case, the court asked whether the defense had any further evidence to present. Defense counsel stated that he had two witnesses to present who

had not yet arrived. Having no other evidence to present the defense rested. (Trial Transcript, Vol. VIII at p. 1406) A few minutes later defense counsel requested that he be permitted to call Mike Clark and Robert Maxwell, but the court denied the request. By way of a proffer, defense counsel stated that if allowed to testify, Clark and Maxwell would have testified that the defendant had a reputation for being truthful and honest. (Trial Transcript, Vol. VIII at pp. 1411-12)

The Fourteenth Court of Appeals held that because Clark's and Maxwell's testimony did not "bear directly on the main issues in the case," it was not error for the court to refuse to reopen the evidence to allow them to testify. (Corrected Opinion at p. 25) Moreover, the Court of Appeals held that even if the trial court did err, that error was harmless. The Texas Court of Criminal Appeals refused to address this claim on habeas review because it had been fully addressed on direct appeal. *Ex parte Smith*, Application No. 48361-03 at p. 683.

"Federal courts review habeas petitions for a 'constitutional infraction of the defendant's due process rights which would render the trial as a whole fundamentally unfair.' 'The test applied to determine whether a trial error makes a trial fundamentally unfair is whether there is a reasonable probability that the verdict might have been different had the trial been properly conducted." *Derden v. McNeel*, 938 F.2d 605, 609 (5th Cir. 1991), *on reh'g*, 978 F.2d 1453 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2928 (1993). As will be discussed below, the evidence against Smith was overwhelming. The testimony of Clark and Maxwell as to Smith's reputation for truthfulness would therefore have made little difference to the outcome of the trial. Smith has failed to demonstrate that the trial

court's refusal to reopen the evidence rendered Smith's trial fundamentally unfair. Moreover, the court defers to the Texas State courts' determination that, under Texas law, the trial court's refusal to reopen the evidence was not erroneous and was, in any event, harmless.

E. Evidentiary Sufficiency

In his Ground for Relief No. 7 Smith argues that the prosecution failed to present any evidence "of how petitioner committed a crime." In his Ground for Relief No. 8 Smith claims the evidence at trial was insufficient to show that Smith unlawfully appropriated the property.

> The critical inquiry on a review of the sufficiency of the evidence to support a criminal conviction . . . is to determine whether the record evidence could reasonably support a finding of guilty beyond a reasonable doubt. The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Williams v. Puckett, 283 F.3d 272, 278 (5th Cir. 2002) (citations and internal quotation marks omitted). The court "must refer to the substantive elements of the criminal [offense] as defined by state law" to assess the sufficiency of the evidence. *Weeks v. Scott*, 55 F.3d 1059, 1062 (5th Cir. 1995).

Texas Penal Code § 31.03, the statute under which Smith was convicted, provides that "[a] person commits an offense if he unlawfully appropriates property with intent to deprive the owner of property." Tex. Penal. Code

§ 31.03(a). Appropriation of property is unlawful if "it is without the owner's effective consent." Tex. Penal Code § 31.03(b)(1). Consent is not effective if it is "induced by deception or coercion." Tex. Penal Code § 31.03(3)(A), or if it is "given solely to detect the commission of an offense," Tex. Penal Code § 31.01(3)(D).

The evidence presented at trial was sufficient to demonstrate that Smith unlawfully appropriated the settlement check with the requisite level of intent. The prosecution presented evidence that Smith submitted documentation to American National, signed by Singleton, purporting to show that Singleton rendered medical treatment to Smith. (Trial Transcript, Vol. V at p. 513; State's Exhibit No. 44[4]) Smith testified that Singleton treated him for the injuries he sustained in the December 1992 accident and admitted to seeking payment from American National for medical expenses related to the December 1992 car accident. (Trial Transcript, Vol. VII at pp. 1179-85, 1190-95) Singleton testified that he never signed a document resembling State's Exhibit No. 44.

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[4] The following dialog was had with the court during trial:

MS. GOODE [for the prosecution]:

And your Honor, I believe the Defense and I are going to join in the offering of this exhibit, which is the original of the document that was submitted to the American National Insurance with the signature in blue ink of David L. Singleton.

MR. FLOOD [for the defense]:

That is correct, your Honor.

THE COURT:

No. 44 will be admitted.

(Trial Transcript, Vol. V at p. 513)

(Trial Transcript, Vol. IV at p. 448, Vol. V at pp. 470-71) Singleton also testified that he never treated Smith. (Trial Transcript, Vol V at p. 471) There was also evidence that Smith did not appear injured immediately after the accident for which he allegedly sought medical treatment. (Trial Transcript, Vol. IV at pp. 271, 310; Vol. V at p. 472) Finally, the prosecution presented evidence that in cooperation with the Harris County District Attorney's Office, American National issued a $10,000 check to Smith, signed by Kathy Samsel, an American National Employee, purporting to settle Smith's claim against American National. (Trial Transcript, Vol. IV at pp. 380-82) From the evidence presented at trial, a reasonable juror could have found each of the essential elements of theft under Texas Penal Code § 31.03. *Cf. Manning v. State,* 68 S.W.3d 697, 698-99 (Tex. App. – Corpus Christi 2001, pet. denied); *Davila v. State,* 956 S.W.2d 587, 589 (Tex. App. – San Antonio 1997, pet. refused).

In his Ground for Relief No. 9 Smith claims that there is insufficient evidence to sustain his conviction because the prosecutor failed to prove beyond a reasonable doubt that the appropriated property was a "check." Smith's argument is without merit. According to the Fourteenth Court of Appeals, "whether the document is categorized as a check, draft, sight order, promissory note, or any other form of commercial paper is irrelevant. All that is necessary is that it have been a type of property obtained by deception." (Corrected Opinion at p. 4) Because Smith admits that the property allegedly appropriated was a draft (Docket Entry No. 1 at p. 25), it is the sort of property contemplated by the theft statute under Texas law as defined by the Fourteenth Court of Appeals. It is not the function of a federal habeas court to review a state's

interpretation of its own laws, and this court must defer to the state court's interpretation of the Texas theft statute. *Weeks v. Scott,* 55 F.3d 1059, 1063 (5th Cir. 1995).

In his Ground for Relief No. 10 Smith claims there is insufficient evidence of his guilt because the prosecution failed to prove beyond a reasonable doubt that Kathy Samsel was the "owner" of the check. The Fourteenth Court of Appeals held that

> [i]n the case before us, Samsel testified that she was employed by American National and that her duties with the company included handling claims resulting from property damage and bodily injury. The evidence showed that she had authority to settle claims with a limit of $10,000.00. Samsel authorized issuance of the check in the amount of $10,000.00 to appellant [Smith]. She signed the check as representative for American National.

(Corrected Opinion at p. 9) These facts are sufficient under Texas law to demonstrate that Kathy Samsel had a greater right to possession of the settlement check than did Smith. *Cf. Manning* 68 S.W.3d at 699 (holding under similar facts that a claims adjuster for an insurance company had a greater right of possession to a settlement check than did the Defendant).

F. Hearsay

In Ground for Relief No. 11 Smith claims that his constitutional rights were violated when State's Exhibit No. 26, the American National claim file, was admitted into evidence because it contained inadmissible hearsay. According to the Court of Appeals, because the prosecution

failed to present a witness having personal knowledge of the records contained in the claims file, it did not qualify as a business record and thus should not have been admitted under the business record exception to the hearsay rule.[5] This court will defer to the finding of the state court that the claim file should have been excluded as hearsay. The issue is whether the erroneous admission of hearsay entitles Smith to habeas relief. The constitutional provisions implicated by the erroneous admission of hearsay are the Confrontation Clause and the Due Process Clause. The court concludes that neither provision has been violated.

Although the hearsay rule and the Confrontation Clause are related, they are not coextensive. The erroneous admission of hearsay does not necessarily constitute the violation of the confrontation clause. In order to determine whether admission of hearsay violates the Confrontation clause, the following five factors must be considered:

(1) whether the hearsay evidence was "crucial" or "devastating;"

(2) whether the prosecutors misused a confession or otherwise engaged in misconduct;

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[5] The court has serious doubts that the contents of State's Exhibit No. 26 qualify as hearsay in the first place. The prosecution's contention at trial was that Smith was not injured and that Smith did not receive the treatment for which he was seeking reimbursement. The statements in the claim file reflected that Smith did receive treatment. The state was offering the claim file, not to prove that Smith received the treatment reflected in the claim file, but to prove that he did not. Therefore, the claim file was not offered to prove the truth of the matters asserted.

(3) whether a joint trial or the wholesale denial of cross-examination was involved;

(4) whether the most important prosecution witness, as well as other prosecution witnesses, was available for cross-examination; and

(5) the degree to which the hearsay evidence is supported by "indicia of its reliability."

Cupit v. Whitley, 28 F.3d 532, 537 (5th Cir. 1994).

The court concludes that admission of the American National Claims file was not "crucial" or "devastating" (factor 1) or unreliable (factor 5). None of the other *Cupit* factors apply in this case. With respect to reliability, as explained above, Smith admitted to submitting a claim to American National and claimed to have been treated by Dr. Singleton. Smith did not deny receiving the treatment reflected in the claim file. (Trial Transcript, Vol. VII at pp. 1251-53) In fact, Smith argued in closing that he did receive the treatment reflected in the claim file. (Trial Transcript, Vol. VIII at p. 1427) There is no reason to question the reliability of the contents of the claim file, at least insofar as it demonstrates that a claim was in fact submitted. Moreover, defense counsel even agreed to admit part of State's Exhibit No. 26 as State's Exhibit No. 44, a letter from Singleton stating that Singleton treated Smith for injuries received in the December 1992 accident.

The prosecution's case did not rely exclusively upon State's Exhibit No. 26 to show that a claim was submitted, and its admission merely helped explain why an investigation into the claim was launched. The prosecution presented other evidence to prove each of the essential elements of the crime. The claim file was therefore neither

"crucial" nor "devastating." Admission of the claim file did not violate the Confrontation Clause.

Even assuming, for the sake of argument, that admission of the claim file violated the Confrontation Clause, habeas relief is nevertheless not warranted because this error was harmless. The inquiry in a habeas court's harmless error analysis is whether admission of the hearsay had a substantial influence on the outcome of the trial. In other words, erroneous admission of hearsay is not harmless if one is left with a grave doubt as to whether the hearsay influenced the conviction. *Cupit*, 28 F.3d at 538-39. The following factors should be analyzed in determining whether admission of hearsay is harmless:

(1) the importance of the witness's testimony in the prosecution's case;

(2) whether the testimony was cumulative;

(3) the presence or absence of evidence corroborating or contradicting the testimony; and

(4) the overall strength of the prosecution's case against the defendant.

Id. at 539. "[T]he strength of the prosecution's case is probably the single most important factor in determining whether the error was harmless." *Id.*

As explained above, the prosecution's case did not rely exclusively on State's Exhibit No. 26. Moreover, State's Exhibit No. 26 did not do much, if any, damage to Smith's case, since he relied in his defense upon the truth of the matters asserted in the claim file, i.e., that he actually received the treatment claimed. As to the fourth factor listed above, the prosecution's case was persuasive, even without reference to the claim file. In addition to the

evidence discussed in Part II.E., *supra*, the prosecution also presented substantial other evidence of Smith's guilt. For example, the prosecution presented evidence that Smith filed a similar claim with another insurance company just months prior to the December 1992 accident. (State's Exhibit No. 17) In that claim Dr. Singleton was alleged to have treated Smith, and again Singleton denied rendering treatment. (Trial Transcript, Vol. V at pp. 474-75) This evidence is highly probative of Smith's intent to commit the offense for which he was indicted. After a thorough review of the record in this case, the court is not left with any "grave doubts" as to whether the admission of the claim file influenced Smith's conviction. Its admission was therefore harmless.[6]

The erroneous admission of State's Exhibit No. 26 constitutes a violation of the Due Process Clause only if it rendered Smith's trial "fundamentally unfair." In this analysis the court must determine whether the evidentiary error was a "crucial, critical, and highly significant factor in the context of the entire trial." *Johnson v. Puckett,* 176 F.3d 809, 821 (5th Cir. 1999). Smith has not explained why the admission of the claims file, the existence and contents of which Smith does not refute, should be considered crucial, critical, or highly significant in this case. The court concludes that admission of State's exhibit No. 26 did not render Smith's trial fundamentally unfair.

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[6] The court notes that the Fourteenth Court of Appeals also found that admission of the claim file was harmless. (Corrected Opinion at p. 42)

G. Erroneous Admission of Evidence

In his Ground for Relief No. 12 Smith alleges his constitutional rights were violated when the trial court admitted into evidence three letters written to the Board of Chiropractic Examiners for the State of Louisiana stating that Smith was, among other things, untruthful, a "breeder of discord," and a thief. (State's Exhibit No. 54; Corrected Opinion at p. 30) Smith argues that the letters should have been excluded as hearsay, and under Texas Rules of Evidence 403[7] and 404(b).[8] Smith's claim is without merit.

The documents were not admitted to prove that Smith acted in conformity with the character traits alleged therein. (Trial Transcript, Vol. VIII at p. 1266) Smith has thus failed to demonstrate that the documents were admitted in violation of Texas Rule of Evidence 404(b). Moreover, Smith has not explained how the probative value of the documents was outweighed by the danger of unfair prejudice, confusion, or some other consideration. The mere fact that the documents were damaging to Smith's case does not compel a finding that they are inadmissible under Texas Rule of Evidence 403. Even assuming for the sake of argument that the trial court did

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[7] Texas Rule of Evidence 403 states "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence."

[8] Texas Rule of Evidence 404(b) states in relevant part that "[e]vidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith."

err in admitting the documents, Smith has failed to show how that error is one that merits habeas relief.

With respect to Smith's hearsay objection, the court notes that the Fourteenth Court of Appeals held that Smith failed to preserve any error with respect to this claim. (Corrected Opinion at 27-28) Assuming for the sake of argument that Smith did preserve error (and that this claim is not procedurally defaulted) and that an error occurred, Smith has failed to demonstrate that he was harmed. Applying the four-factor test set forth in *Cupit, supra,* Part II.F., the court concludes that this error was harmless. As previously noted, the prosecution's case was very persuasive against Smith. Moreover, although there is no evidence to corroborate the letters, the contents of the letters was not very important to the prosecution's overall case, and the impeachment value of the letters was cumulative of other evidence in the case. The prosecution had significant other impeaching evidence. Moreover, the facts established in the letters were of tangential importance to the main issues in the case.

Smith claims in his Ground for Relief No. 13 that his constitutional rights were violated when Richard Pigg was allowed to testify during the punishment phase of the trial regarding an accident that Smith and Pigg staged. At trial Smith's attorney objected under Texas Rule of Evidence 404(b) and Texas Rule of Criminal Procedure 37.07, on the ground that proper notice had not been given. Under the 1994 version of Texas Rule of Criminal Procedure 37.07, it is proper to introduce "any matter the court deems relevant to sentencing, including . . . evidence of an extraneous crime or bad act that is shown beyond a reasonable doubt . . ." Tex. Crim. Proc. Rule 37.07, sec. 3(a). If a defendant makes a request for notice to the prosecution,

notice of intent to introduce evidence of such a prior crime or bad act must be given in the same manner as provided by then Texas Rule of Criminal Evidence 404(b). Tex. Crim. Proc. Rule 37.07, sec. 3(g).

Smith has presented no evidence that it was improper for Pigg to testify about the staged accident. Moreover, although it does appear that Smith's counsel made a proper request for notice under Texas Rule of Criminal Evidence 404(b), there is no indication that a request for notice was made under Rule 37.07. Moreover, Smith has failed to show that he was not notified that Pigg would testify. Thus, Smith has failed to present any evidence that any error occurred in admitting Pigg's testimony. Moreover, assuming for the sake of argument that an error did occur, Smith has given no indication of how that error has risen to the level of a constitutional violation meriting habeas relief. Not every trial error warrants habeas relief.

In Smith's Ground for Relief No. 14 he claims that his constitutional rights were violated when Mike Clark was not allowed to testify about Kassner's reputation for truthfulness. However, when defense counsel attempted to ask Clark about Kassner's reputation for truthfulness, the prosecution objected, and defense counsel immediately withdrew the question. (Trial Transcript, Vol. VI at p. 868) Defense counsel made no further attempts to question Clark about this matter. Smith is not entitled to habeas relief on this ground because the trial court never refused to allow the line of questioning.

Smith's Ground for Relief No. 15 states that Smith's constitutional rights were violated when the trial court refused to allow Jerry Cobb to testify as to Mike Clark's

reputation for truthfulness. Because Clark's truthful character had never been attacked, it was not unreasonable for the Texas Court of Criminal Appeals to find, as a matter of Texas Law, any questioning of Cobb about Clark's reputation for truthfulness to be irrelevant and improper bolstering. *See Ex parte Smith*, Application No. 48,361-03 at p. 684.

H. Ineffective Assistance of Counsel

Smith alleges in his Ground for Relief No. 16 that he was denied effective assistance of counsel at trial. Under the standard set out in *Strickland v. Washington,* a defendant asserting ineffective assistance of counsel must prove that (1) counsel's performance was deficient and (2) counsel's deficient performance prejudiced the defense. 104 S. Ct. 2052, 2064 (1984). If the defendant makes an insufficient showing on one prong of the test, the court need not address the other. *Id.* at 2069. In order to prevail, a defendant must overcome a strong presumption that counsel rendered adequate assistance and made decisions in the exercise of reasonable professional judgment. *Id.* at 2065-66. A defendant must affirmatively prove prejudice, *id.* at 2067, and demonstrate ineffectiveness by a preponderance of the evidence, *Jernigan v. Collins,* 980 F.2d 292, 296 (5th Cir. 1992). To qualify as prejudice under the *Strickland* standard, counsel's deficient performance must render the result of the trial unreliable or the proceeding fundamentally unfair. *Lockhart v. Fretwell*, 113 S. Ct. 838, 844 (1993). Finally, the defendant must overcome the presumption that under the circumstances his attorney's acts or omissions might be considered sound trial strategy. *Bell v. Cone,* 122 S. Ct. 1843, 1852 (2002) (explaining that

this rule applies even where the deferential standard of 28 U.S.C. § 2254(d)(1) does not apply).

Smith alleges that his trial counsel was ineffective for failing to hire a handwriting expert to demonstrate that Dr. Singleton signed the documents submitted to American National. However, because Dr. Singleton admitted that the subject signatures looked like his (Trial Transcript, Vol. V at p. 584), hiring a handwriting expert would have been fruitless. Therefore, Smith's trial counsel was not defective for failing to hire a handwriting expert. Moreover, it does not appear that the testimony of a handwriting expert would have changed the outcome of the trial since the only evidence such an expert could have provided was undisputed.

Smith claims his counsel was defective for failing to discredit Kassner by confronting him with a number of documents and by failing to call Rod Harris to impeach Kassner. Smith claims that his trial counsel failed to investigate the facts of the case and therefore did not realize that he had at his disposal a number of pieces of evidence with which he could have cross-examined and impeached Kassner. Assuming for the sake of argument that Smith's allegations are correct and that his trial counsel was defective in this regard, Smith has failed to demonstrate that absent his counsel's defective performance the outcome of the trial would have been different. Kassner was not the prosecution's only source of evidence of Smith's guilt. In fact, the main witness against Smith was Singleton. Smith fraudulently claimed Singleton rendered him medical treatment and submitted documents to American National reflecting the same. Had Kassner been entirely discredited, the evidence against Smith would still have pointed overwhelmingly to his guilt, and a jury would likely have come to the same verdict.

Finally, Smith claims that his counsel was ineffective when the trial court denied trial counsel the right to have an additional peremptory challenge during voir dire of the jury. (*See* Trial Transcript, Vol. II at p. 161.) Smith has not explained how any action on the part of the trial court can render his counsel's performance defective. This claim is without merit.

III. Conclusion and Order

Because Smith has not raised claims that would justify issuance of a writ of habeas corpus, Cockrell's Motion for Summary Judgment (Docket Entry No. 8) is **GRANTED**, Smith's Motion for Summary Judgment (Docket Entry No. 7) is **DENIED**, and Smith's First Amended Motion for Summary Judgment (Docket Entry No. 10) is **DENIED**. The Petition for Writ of Habeas Corpus (Docket Entry No. 1) is **DISMISSED**.

Smith's Motion to Expedite Show Cause Order and Service of Petition (Docket Entry No. 3) is **MOOT**.

Smith's Motion for Notice to Respondent of Court's Consideration of Petitioner's Motion for Summary Judgment (Docket Entry No. 9) is **DENIED**.

SIGNED at Houston, Texas, on this 13th day of September, 2002.

/s/ Sim Lake
SIM LAKE
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

TODD REAGAN SMITH Petitioner, v. JANIE COCKRELL, Respondent.	§ § § § § § §	CIVIL ACTION NO. H-02-0010

FINAL JUDGMENT

(Filed Sep. 16, 2002)

In accordance with the court's Memorandum and Order entered today, this action is **DISMISSED with prejudice**.

For the reasons stated in the court's Memorandum and Order and because petitioner has not made a substantial showing of the denial of a constitutional right, a Certificate of Appealability is **DENIED**.

This is a **FINAL JUDGMENT**.

SIGNED at Houston, Texas, on this 13th day of September, 2002.

/s/ Sim Lake
SIM LAKE
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 02-21133

TODD REGAN SMITH

Petitioner – Appellant

v.

JANIE COCKRELL, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL
JUSTICE, INSTITUTIONAL DIVISION

Respondent – Appellee

Appeal from the United States District Court
for the Southern District of Texas Houston

ON PETITION FOR REHEARING EN BANC

(Filed May 16, 2003)

Before JONES, STEWART, and DENNIS, Circuit Judges.

PER CURIAM:

(X) No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed.R.App.P. and 5th Cir.R.35), the Petition for Rehearing En Banc is DENIED.

( ) The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (Fed.R.App.P. and 5th Cir.R.35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Carl E. Stewart
United States Circuit Judge

[LOGO]
BEHRMAN
chiropractic

3 May 1990

Louisiana Board of Chiropractic Examiners;

Please be advised that of today, 3 May 1990, the Internship Agreement between myself and TOdd R. Smith is terminated.

This decision of termination was made without reservation solely by myself, and had nothing to do with the owner(s) of this facility.

It is my opinion that Todd R. Smith is a liar and a breeder of discord.

Sincerely;
/s/ Chris Zocco

5250 Veterans Blvd. • Suite A •
Metairie, Louisiana 70006 •
(504) 454-0117

[LOGO]
BEHRMAN
chiropractic

3 May 1990

Louisiana Board Of Chiropractic Examiners;

This letter is being written as a testament as to the person of Todd R. Smith. Dr. Smith was employed by Behrman Chiropractic and practiced under a temporary license under the internship agreement between himself and Dr. Chris Zocco.

Dr. Todd Smith was found to be stealing from the company. He was fired because of this, and also because of poor doctor performance and an apathetic attitude towards the company and his patients.

We hope this letter will serve as further documentation as to the dismissal and personal character of Todd R. Smith.

Sincerely;

/s/ Peggy Mesman
Peggy Mesman
Regional Office Manager;
Behrman Chiropractic Clinics

/s/ Rachel Estopinal
Rachel Estopinal; Receptionist

5250 Veterans Blvd. • Suite A •
Metairie, Louisiana 70006 •
(504) 454-0117

[LOGO]
BEHRMAN
chiropractic

21 May 1990

Louisiana Board of Chiropractic Examiners;

Please be advised that we, the undersigned, confirm all the information and accusations contained in the enclosed documents.

Sincerely;

Peggy Mesman
Regional Office Manager

/s/ Peggy Mesman Rachel Estopinal
Rachel Estopinal
Receptionist/Veterans Office

5250 Veterans Blvd. • Suite A •
Metairie, Louisiana 70006 •
(504) 454-0117

21 May 1990

Louisiana Board of Chiropractic Examiners
5800 One Perkins Place Suite 5 C
Baton Rouge, Louisiana 70808

Dear LA Board:

This letter is being written as a formal complaint, concerning the nature, person, and practicing procedures of Todd R. Smith, D.C. It is with regret that a letter such as this needs to be written.

During my eight week association with Todd Smith, I came to many conclusions about him, both as a person, and also as a doctor. My first impression was that was obvious approval of his energy and ideas. He seemed very excited about practicing and about establishing a thriving practice in the New Orleans area. He had recently graduated from Texas Chiropractic College, apparently with honors. His credentials were impressive.

Yes, as I began actively working with him, I realized that his credentials would not be enough to carry him into "doctorhood." He had a horrible rapport with the patients, as well as with the office staff. After working with him for two days, the receptionist quit. The regional insurance clerk also refused to work in this office and moved her files and desk to one of our other offices. We hired a new receptionist, who quit after ten days because of the office conflicts and tension.

Todd has perhaps the most distorted sense of reality that I have ever come across. He is a perpetual lier. He also has the uncanny ability to actually believe his lies.

His concept of practicing was to "treat patients." He would repeatedly mention that all he wanted to do was "treat

patients." He often refused to perform necessary examinations or take necessary x-rays, because he merely wanted to "treat patients." When he was finally reprimanded (by the Behrman owner) for not charging for patient examination, Todd started charging for exams, but not actually performing them. There were many heated discussions between him and myself about "accountability." He was not concerned.

As a doctor, he leaved much to be desired. He was not caring, concerned, nor sincere. His intentions were never motivated or influenced by a giving heart; he didn't have one. [page 2] He never explained chiropractic procedures to patients, nor gave them accurate information regarding this office or their condition. He never followed office policy . . . or accepted protocol, for that matter. He charged different fees to different patients, and advertised in unprofessional ways.

He failed to perform necessary tasks relative to practing, ie, giving a patient diagnosis to the insurance clerk; re-examing or re-x-raying patients. It was also very common for him to discuss medical information and medical diagnoses with patients, when it was out of his scope of practice.

Todd Smith also stole from the company. He used the Behrman postage meter for his personal use, for an estimated total postage of $100-$200. He also used money from petty cash for personal purchases and perhaps frequently for no purchase at all; this was found to occur at least once.

Todd, after being fired, was verbally threatening and violent. The Behrman owner called me and had me contact a locksmith to change the locks on the office that evening

because he feared Todd would destroy the office interior and all the equipment. I also took the precaution of hiring a Jefferson Parish police officer to stay in the office the following day, due to threats by Mr. Smith.

Todd came back to the office the following week and we were forced to call the police because he would not leave, and continued with verbal abuse and threats. It is my opinion that he is of questionable psychiatric stability.

There have also been numerous complaints from patients, concerning his character, personality, and chiropractic skills. It would not be an overstatement to suggest that the patients are well pleased with his dismisal.

I hope this letter helps to further clearify the situation. I also hope that this letter remains confidential, for I honestly fear for my personal safety, as well as that of my office staff.

I remain;

/s/ Chris Zocco
Chris Zocco, D.C.
Behrman Chiropractic

STATE'S EXHIBIT 2

[LOGO]
AMERICAN
NATIONAL
American National
Property & Casualty Co.
Corporate Centre
1949 East Sunshine
Springfield, Missouri 65899-0001

Payable Through
Empire Bank
Springfield, Missouri

80-1847/865 **000000213940**

Claim No. 42A-483936

ANPAC
CLAIMS LOSS CHECK
Dates 9-14-93

Pay To the Order of

TODD SMITH, INDIVIDUALLY AND AS YOUR INTEREST MAY APPLY & JOHN R. CHILES IV, AS HIS ATTORNEY

****TEN THOUSAND AND NO/100 Dollars $10,000.00

In Payment of _____

Deliver To

JOHN R CHILES IV, ATTORNEY

9898 BISSONNET, SUITE 370

HOUSTON TX 77036

DO NOT WRITE BELOW THIS LINE

Representative KATHY SAMSEL

Contact No. 178

/s/ Kathy Samsel
Authorized Representative

00213940 086518477 1032859

Detach and Retain this Statement

American National
Property & Casualty Co.
Corporate Centre
1949 East Sunshine
Springfield, Missouri 65899-0001

000000213940

Date: 9-14-93

ANPAC
CLAIMS LOSS CHECK

COV		Amount
01	F	$10,000.00

Claim No. 42A-483936
Policy No. 42A-246336
Date of Loss 12-13-92
Representative 178
KATHY SAMSEL
Issuing DCR 267
JUDY HALL
Insured
WAYNE BRADFORD
Agent _____

CAT No. _____
Cause of Loss _____
Check Total $10,000.00
IRS Number 225-82-1289

NOTICE: All payees must endorse. Incomplete endorsement will result in delay of payment.

****

Check may include mortgagee/lienholder as required by conditions of policy. Contractor/Body shop may also be shown.

STATE'S EXHIBIT 3

RELEASE

Claim # 42-A-483-936

I, the undersigned, to secure this payment, hereby warrant and covenant that I am not in arrears with regard to child support and not the subject of a child support lien. I further agree to indemnify and hold harmless American National Property & Casualty Company, its officers, agents, representatives and employees, corporate parents subsidiaries successors in interest corporate affiliates, agents and assignees from any such lien. /s/ Todd Smith

INITIALED

For the Sole Consideration of $10,000.00

TEN THOUSAND ---------- Dollars,

to be paid the undersigned hereby releases and forever discharges

WAYNE BRADFORD, JILL BRADFORD AND AMERICAN NATIONAL PROPERTY & CASUALTY COMPANY THEIR heirs, executors, administrators, agents and assigns, and all other persons, firms or corporations liable or, who might be claimed to be liable, none of whom admit any liability to the undersigned but all expressly deny any liability, from any and all claims, demands, damages, actions, causes of action or suits of any kind or nature whatsover, and particularly on account of all injuries, known and unknown, both to person and property, which have resulted or may in the future develop from an accident which occurred on or about the

13th day of DECEMBER, (year) 1992 at or near KIRKENDALL & I-35 NEAR SPRING TEXAS.

This release expressly reserves all rights of the parties released to pursue their legal remedies, if any, against the undersigned, their heirs, executors, agents and assigns.

Undersigned hereby declares that the terms of this settlement have been completely read and are fully understood and voluntarily accepted for the purpose of making a full and final compromise adjustment and settlement of any and all claims, disputed or otherwise, on account of the injuries and damages above mentioned, and for the express purpose of precluding forever any further or additional claims arising out of the aforesaid accident.

Undersigned hereby accepts check or checks as final payment of the consideration set forth above.

Signed, sealed and delivered this 7 day of Oct, 1993.

Witness
/s/ Carl Presly

x /s/ Todd Smith
TODD SMITH

State of _____

County of _____

Subscribed and sworn to before me this _____ day of _____, 19 ____.

_____
Notary Public

NOTE: ADDITIONAL INFORMATION ON REVERSE SIDE.

CM-8 (10-92)

Applicable in California

For your protection, California law requires the following to appear on this form:

It is unlawful to:

(a) Present or cause to be presented any false or fraudulent claim for the payment of a loss under a contract of insurance.

(b) Prepare, make, or subscribe any writing, with intent to present or use the same, or to allow it to be presented or used in support of any such claim.

Every person who violates any provision of this section is punishable by imprisonment in the state prison, or by fine not exceeding one thousand dollars ($1,000), or by both.

Applicable in Florida

Any person who knowingly and with intent to injure, defraud, or deceive any insurance company files a statement of claim containing any false, incomplete or misleading information is guilty of a felony of a third degree.

Applicable in Pennsylvania

Any person who knowingly and with intent to injure or defraud any insurer files an application of claim containing any false, incomplete or misleading information shall, upon conviction, be subject to imprisonment for up to seven years and payment of a fine of up to $15,000.

Applicable in Ohio

Any person who, with intent to defraud or knowing that he is facilitating a fraud against an insurer, submits an application or files a claim containing a false or deceptive statement is guilty of insurance fraud.

Applicable in Indiana

A person who knowingly and with intent to defraud an insurer files a statement of claim containing any false, incomplete or misleading information commits a felony.

Applicable in Nevada

Pursuant to NRS 686A.291, any person who knowingly and willfully files a claim that contains any false, incomplete or misleading information concerning a material fact is guilty of a felony.